

# The Importance of Being Elegant

HARRY H. WELLINGTON\*

## I.

The informed citizen—and he need not be a lawyer—may find it extraordinary that in 1980 two distinguished constitutional scholars have written books on judicial review.<sup>1</sup> It was in 1803, after all, that *Marbury v. Madison*<sup>2</sup> recognized, established, or usurped—depending on one's viewpoint—that particular corner of the sovereign's prerogative. And that precedent has stood firm these one hundred and seventy-eight years. Not only that, judicial review has been well rehearsed in the literature. Indeed, in the late 1950s and early 1960s the informed citizen was inundated with superb scholarship on the same subject.<sup>3</sup> Why must each generation reinvent the wheel?

The answer, I think, is that judicial review is not a wheel. It is a powerful method of governance, and new situations arise from time to time to test the justifications offered earlier in support of the method's legitimacy. To speak only of the recent past: many students rejected *Lochner*,<sup>4</sup> embraced *Brown*,<sup>5</sup> and needed supporting scholarship; and many students approved the work of the Warren Court, had trouble with *Roe v. Wade*,<sup>6</sup> and again needed scholarship to get it all straight. Ely and Choper, in books being celebrated in this Symposium, help serve this need. But paradoxically their writing makes clear that there is room for more; the subject probably can never be closed.

## II.

If I were to write an essay on judicial review (and this most emphatically is not that), I would begin by addressing the relationship among three types of adjudication: common law, statutory, and constitutional. My claim would be that where it matters, the three are more alike than Ely or Choper imagines.<sup>7</sup> I would stress this similarity for two reasons. First, few informed citizens question the legitimacy of courts with a small c. If the Court does what courts do, it follows that an attack on judicial review entails an attack on the American style of adjudication. Second, how judges do what they do tells us something about the "modalities"<sup>8</sup> of judicial review, about how the Justices should

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\* Dean and Edward J. Phelps Professor of Law, Yale Law School.

1. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) [hereinafter cited as CHOPER]; J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY].

2. 5 U.S. (1 Cranch) 137 (1803).

3. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); C. BLACK, *THE PEOPLE AND THE COURT* (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

4. *Lochner v. New York*, 198 U.S. 45 (1905).

5. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

6. 410 U.S. 113 (1973).

7. Compare CHOPER, *supra* note 1, at 131–32, with ELY, *supra* note 1, at 67–68.

8. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 104 (1962).

decide constitutional questions. We can learn about the nature of judicial review by attending to the nature of the judicial process.

I have argued elsewhere that to understand the judicial process one must understand the sources of law; and that, in a complex way, conventional morality is a source of law that proves important in the elaboration of some constitutional provisions.<sup>9</sup> Ely derides this. He thinks it is silly to believe that conventional morality has any place in the judicial determination of a statute's constitutionality. He has several arguments. At bottom, he seems to equate legislation with conventional morality, or—to put it another way—he conflates two concepts: majority rule and conventional morality.<sup>10</sup> I do not wish to join issue here except to insist that central to an understanding of majority rule is an explanation of political power and that such power is sometimes exercised in the teeth of conventional morality.

Much of Ely's and Choper's concern with the legitimacy of judicial review derives from its counter-majoritarian tendency and the importance of majority rule in democratic theory. Majority rule is important, and thus their concern is both standard and correct. Indeed, for an essay to depict the Court as a court and to connect constitutional adjudication (where appropriate) to *conventional* morality not only would present judicial review as a relatively familiar method of governance, but also as itself related to majority rule.<sup>11</sup> Were I to write that essay, I might undertake to strengthen this latter argument by exploring—as Choper does—the myth and reality of majority rule in contemporary legislative and executive bureaucracies.<sup>12</sup> The purpose would be to show how complex, varied, and subtle majority rule is, and how judicial review can be accommodated to it when it is realistically conceived.

### III.

Both Choper's and Ely's accounts of judicial review are heavily functional (although Ely's is better described as structural). Choper tells us that "the overriding virtue of and justification for vesting the Court with this awesome power is to guard against governmental infringement of individual liberties secured by the Constitution."<sup>13</sup> And Ely (to use his chapter headings) sees judicial review as a method of policing the process of representation, clearing the channels of political change, and facilitating the representation of minorities. Judicial review "can appropriately concern itself only with questions of participation," he tells us, "and not with the substantive merits of the political choice under attack."<sup>14</sup>

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9. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-311 (1973).

10. ELY, *supra* note 1, at 63-69.

11. *But see id.* at 69 ("It makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority." (footnote omitted)).

12. *See* CHOPER, *supra* note 1, at 4-59.

13. *Id.* at 64.

14. ELY, *supra* note 1, at 181.

While our two authors have differing perspectives, they occupy common ground in that for each the justification of judicial review is the systemic failure of other governmental branches. This is not an inevitable position. One could justify judicial review in nonpurposeful terms: it is because the Constitution provides for it; or, one could claim that the purpose of judicial review is the correction by the Court of improper decisions made in other agencies of government. (A necessary and sufficient condition of unconstitutionality is bad governmental action.)

If I were to write an essay on judicial review, I would try to stand on their ground. My notion of what constitutes a systemic failure, however, is surely different from (although sometimes overlapping) Ely's and, I suspect, Choper's. I would want to come to grips with the play between an admixture of consent and individual autonomy, on the one hand, and governance through majority rule by the explicitly political branches, on the other. Maintaining an appropriate accommodation between the two is a critical reason for judicial review. The standard to be applied, which roots in the judicial process, in some areas requires judging the exercise of political power against the Court's reading of conventional morality.

This approach properly troubles Ely.<sup>15</sup> But he is wrong to ridicule the enterprise, and were I to write that essay, I would try to show why. The essay, in addition to relating the approach to the nature of the judicial process, and casting doubt on the standard myth of majority rule, would surely address judicial mistake; *i.e.*, the Court's misreading of conventional morality and the consequences thereof. That would include such topics as the differences among types of constitutional decisions,<sup>16</sup> the differences between decisional law and constitutional amendment, the relationship between *stare decisis* and incrementalism,<sup>17</sup> the Lincolnian tension and the role of precedent,<sup>18</sup> and the passive virtues after twenty years.<sup>19</sup> Perhaps the essay would have to be a book.<sup>20</sup>

Ely and Choper did write books. Their approaches led them to discuss rather different topics from the ones that I would have to address were I as brave as they. And each author himself treats different topics. I cannot deal with both and I want to deal just a little with Ely because there is a lesson to be learned: *Democracy and Distrust* demonstrates the difficulty of being elegant.

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15. *Id.* at 63-69.

16. *Compare, e.g.*, the dissenting opinion of Mr. Justice Stewart in *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2798-803 (1980), with Mr. Justice Stevens' dissent in the same case. *Id.* at 2803-14.

17. See Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 LAW IN TRANSITION QUARTERLY 134 (1965).

18. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 65-72, 254-72 (1962).

19. *Id.* at 111-98.

20. I mean to try it at the Benjamin N. Cardozo Lecture at the Bar of the City of New York in March, 1981.

## IV.

John Hart Ely has committed a beautiful book. It is slim, provocative, and done with grace and style. All who read it will come away wiser. As I read the book, I disagreed mildly with some propositions and intensely with others. I take that to be the nature of the subject. When I closed the book, however, I wondered whether there wasn't more than a little vice in at least one of its virtues.

Like many good academic lawyers, Ely is in quest of a theory that will organize and explain a vast number of discrete events. While one need not insist that no one should be an academic if he is not engaged in a similar enterprise, no one can convincingly deny the importance of such enterprises. There is a danger, however: the cleaner, neater, and simpler the theory is, the more appeal it is apt to have for the academic who has developed it. Theorists crave elegance as moths crave light. Yet in the legal world, seemingly elegant theories tend to be radically incomplete.

Ely starts his quest for an explanatory theory by rejecting what he takes to be the conventional approaches to judicial review. Interpretivism ("judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution . . ."<sup>21</sup>) is alluring. But it doesn't work. Other approaches—most of which Ely tends to characterize as the judicial imposition of "fundamental values"—include "the judge's own values," "natural law," and "neutral principles." These have patent defects.<sup>22</sup> More significant are "reason," "tradition," and "consensus." On reason, he says: "The error here is one of assuming that something exists called 'the method of moral philosophy' whose contours sensitive experts will agree on . . ."<sup>23</sup>; on tradition: It "can be invoked in support of almost any cause."<sup>24</sup> "Its overtly backward-looking character highlights its undemocratic nature . . ."<sup>25</sup>; and on consensus: "[A]s between courts and legislatures, it is clear that the latter are better situated to reflect consensus."<sup>26</sup>

Thus does Ely come to his theory. It grows out of footnote four of *Carolene Products*,<sup>27</sup> which he explains as follows:

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21. ELY, *supra* note 1, at 1.

22. *Id.* at 44-55.

23. *Id.* at 57-58.

24. *Id.* at 60 (footnote omitted).

25. *Id.* at 62.

26. *Id.* at 67.

27. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). The note, with citations omitted, reads:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to

The first paragraph is pure interpretivism: it says the Court should enforce the "specific" provisions of the Constitution. We've seen, though, that interpretivism is incomplete: there are provisions in the Constitution that call for more. The second and third paragraphs give us a version of what that more might be. Paragraph two suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open. Paragraph three suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws "directed at" religious, national, and racial minorities and those infected by prejudice against them.<sup>28</sup>

And Ely says:

I have suggested that both *Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.<sup>29</sup>

For Ely, "a participation-oriented, representation-reinforcing approach to judicial review"<sup>30</sup> finds support in the structure of the Constitution; it is procedural, "using the term in a large sense,"<sup>31</sup> although "our Constitution is too complex a document to lie still for *any* pat characterization."<sup>32</sup> And, "if anything more important," in two "overtly normative"<sup>33</sup> arguments: "The first is . . . that unlike an approach geared to the judicial imposition of 'fundamental values,' the representation-reinforcing orientation . . . is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy."<sup>34</sup> What it does is police "the mechanisms by which the system seeks to ensure that our elected representatives will actually represent."<sup>35</sup> The second argument "is that (again unlike fundamental values approach) a representation-reinforcing approach assigns judges a role they are conspicuously well situated to fill."<sup>36</sup> This is so because they are "comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely."<sup>37</sup> Ely's central point is:

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more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

28. ELY, *supra* note 1, at 76 (footnote omitted).

29. *Id.* at 77.

30. *Id.* at 87.

31. A. BICKEL, *THE MORALITY OF CONSENT* 78 (1975).

32. ELY, *supra* note 1, at 101 (emphasis in original).

33. *Id.*

34. *Id.* at 101-02.

35. *Id.* at 102.

36. *Id.* (footnote omitted).

37. *Id.* at 103.

Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which "the people" really disagree—or would "if they understood"—are likely to be little more than self-deluding projections). In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>38</sup>

If we put to one side Ely's insistence that in constitutional adjudication judges are never to impose what he calls "fundamental values," I believe there is a good deal to be learned from the above quotations; quotations which, I think, capture the essence of Ely's approach to judicial review. And to work out the theory, as he does in *Democracy and Distrust*, is a splendid accomplishment.

But what about Ely's insistence on excluding from his theory the "fundamental values" approaches ("reason," "tradition," "consensus," etc.) of his predecessors? On the one hand, Ely knows that his approach can be forced into the dreaded value framework. He tells us so in a long footnote.<sup>39</sup> But, on the other hand, I wonder whether he realizes the extent to which any judge must—if he is not to be rendered dumb—do what Ely forbids in areas where Ely's theory demands that the judge speak.

Consider legislative apportionment. Here we surely have a testing case, for I would suppose that nothing is clearer than that "a participation-oriented, representation-reinforcing approach to judicial review"<sup>40</sup> requires the Court to strike down legislative malapportionments. One certainly cannot rely on the legislature. As Ely puts it, "those in power have a vested interest in keeping things the way they are."<sup>41</sup>

While Ely ends up approving the "one person-one vote" standard articulated in *Reynolds v. Sims*<sup>42</sup>—because a more flexible standard, suggested by Justice Stewart,<sup>43</sup> would have been an "unadministrability thicket"<sup>44</sup>—he understands full well that the really tough question is, how does a judge know if a legislative apportionment is mal?<sup>45</sup> Ely finds the answer mainly in a line of growth of the republican form of government clause:

38. *Id.* (emphasis in original) (footnote omitted).

39. *Id.* at 75 n.\*.

40. *Id.* at 87.

41. *Id.* at 120 (footnote omitted).

42. 377 U.S. 533 (1964).

43. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting).

44. ELY, *supra* note 1, at 124 [relying on Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169, 247 (1978)].

45. ELY, *supra* note 1, at 120-25. Indeed, Ely surrounds the word malapportionment with quotation marks. *Id.* at 120.

In judging the propriety of such a line of growth it is surely appropriate, indeed I should think it imperative, to look to the ways our constitutional document has developed over the two centuries since the Republican Form Clause was drafted. Not only has the Fourteenth Amendment underscored our commitment to equality in the distribution of various goods—particularly, one has to suppose, those that are crucial to one's ability to protect oneself respecting the distribution of all others—but several other amendments, in fact most of the recent ones, have extended the franchise to persons who previously had been denied it, thereby reflecting a strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions. Valuing a vote thus granted at a fraction of the votes of others obviously undercuts the commitment this constitutional development reflects.<sup>46</sup>

That sounds persuasive to me, although it is not the case that, in the absence of judicial protection, women and eighteen year olds would, as a *class* of then newly enfranchised voters, have been treated differently from other voters. But no matter. What does matter is that the quote also sounds to me like "fundamental values" talk, like an admixture of the sharply rejected "reason," "tradition," and "consensus" approaches. This is not surprising. Without some variation or other of a "fundamental values" approach, how could a judge possibly know that a legislative apportionment was unconstitutional? Remember, the Constitution provides that the "Senate of the United States shall be composed of two Senators from each State, elected by the People thereof, for six years; and each Senator shall have one vote."<sup>47</sup> And remember that the Constitution fails to provide for the direct popular election of the President. This is deep structural evidence out of the Constitution against any simple—as contrasted to complex—conception of malapportionment, let alone the one person-one vote principle. Moreover, while the Constitution does not say anything about it, gerrymanders are as American as apple pie, football, and judicial review.<sup>48</sup>

It may be—as Ely says—that "the Fourteenth Amendment underscored our commitment to equality in the distribution of various goods—particularly, one has to suppose, those that are crucial to one's ability to protect oneself respecting the distribution of all others . . . ."<sup>49</sup> (Of course, that could be an argument for making education a "fundamental value."<sup>50</sup>) And there may be—as Ely insists—a close relationship between the extension of the franchise and the value of a vote. But I simply do not understand how one can know without finding in the republican form of government or equal protection clauses (or both together) a principle of political fairness—based on a conception of representative democracy—that can be elaborated into a judicial

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46. *Id.* at 123.

47. U.S. CONST. amend. XVII.

48. See *Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973).

49. ELY, *supra* note 1, at 123.

50. Compare *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), with *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241 (1971).

standard. And that is possible only through one or more of the approaches Ely insists we discard.

Legislative apportionment illustrates the limitation of Ely's theory. In attempting to reconcile what he sees as a sharp conflict between majority rule and judicial review, he seeks to give a "process-based"<sup>51</sup> answer to two problems that such a conflict would present. One is the appropriate area for the exercise of judicial review (*e.g.*, legislative apportionment); the other is how the Court is to develop decisional standards within that area (*e.g.*, one person-one vote). Approaches that Ely calls "fundamental values" may be vulnerable if used to solve the first problem;<sup>52</sup> they are essential for a solution of the second. Therefore, given Ely's problem, any theory that tries to eliminate those approaches entirely may seem elegant but must be incomplete.

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51. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

52. There are other ways besides Ely's of trying to deal with this problem. One is to define it a little differently. Instead of asking what the appropriate area for the exercise of judicial review is, one might ask what the scope of judicial review in various areas should be: should it be searching, or should there be a powerful presumption of constitutionality in favor of the legislative enactment? See generally Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).